Manville Forest Products Corporation *and* United Paperworkers International Union, AFL-CIO, and its Local 364. Cases 15-CA-7981-1, -2 and 15-CA-8007

December 14, 1982

ORDER DENYING MOTION

BY MEMBERS FANNING, JENKINS, AND HUNTER

Upon charges filed on December 29, 1980, and January 22, 1981, by United Paperworkers International Union, AFL-CIO, and its Local 364, herein called the Union, and duly served on Manville Forest Products Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 15, issued a consolidated complaint in Cases 15-CA-7981-1 and 15-CA-7981-2 on February 9, 1981, and a complaint in Case 15-CA-8007 on March 2, 1981, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. On March 2, 1981, the Regional Director issued an Order Consolidating Cases and Notice of Hearing in these cases. Copies of the charges and consolidated complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

The complaint alleges in substance that Respondent is a successor employer to Olinkraft, Inc., and that without prior notice to and/or without having afforded the Union a meaningful opportunity to bargain, Respondent subcontracted out certain enumerated maintenance work tasks which could have been performed by unit employees. In addition, the complaint alleges that Respondent has failed and/or refused to furnish the Union in a timely fashion with information it requested which is relevant and necessary to bargaining over the subcontracting involved in Case 15-CA-8007.

On February 16 and March 9, 1981, Respondent filed its answers to the complaints admitting in part, and denying in part, the allegations in the complaints. Thereafter, on June 25, 1982, Respondent filed a Motion to Transfer the Case to the Board and for Summary Judgment or Dismissal[1] on the grounds that it had fulfilled its bargaining obligation as to 78 of the 84 subcontracted tasks enumerated in the complaints by notifying the Union in writing more than 7 days in advance of its intent to subcontract these tasks. Respondent contended that the giving of this notice was the extent of its bargaining obligation as enunciated by the court in *Olinkraft, Inc.* v. *N.L.R.B.*, 666 F.2d 302 (5th Cir. 1982). Thus, Respondent contended that, as a matter of law, no violation can be found with respect to the subcontracting of 78 tasks.

Subsequently, on July 2, 1982, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why Respondent's Motion for Summary Judgment should not be granted. On July 6, 1982, the General Counsel filed an opposition to Respondent's motion; on July 23 the General Counsel filed a response to the Notice To Show Cause. The General Counsel argued that Respondent's motion should be denied because material issues remain unresolved, even assuming the court's disposition of *Olinkraft, supra*, to be controlling as to the issue of subcontracting notice. The General Counsel noted that the granting of Respondent's motion would leave unresolved the issue as to whether Respondent is a successor employer of Olinkraft and the issue of Respondent's failure to supply the information requested by the Union. Absent the receipt of this information, the General Counsel argued, the Union was prevented from properly responding to the proposed subcontracting.

Respondent filed a response to the Notice To Show Cause and an opposition to the General Counsel's response on July 20 and 28, 1982, respectively. In substance, Respondent admitted successorship for the purposes of summary judgment and contended that it was not required to supply the information the Union requested because the court decision indicated that its sole obligation with respect to subcontracting is limited to the giving of appropriate notice to the Union which it had done regarding 78 of the 84 tasks at issue. Respondent argued that if the Board should conclude that there exists an obligation to supply information, this allegation and those involving the other 6 tasks on which Respondent did not seek summary judgment should go to hearing but that this alone should not preclude summary judgment as to the subcontracting of the remaining 78 tasks.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have duly considered this matter and find that there are material issues of fact still to be resolved in this proceeding. Accordingly, we remand

[1] Respondent has also requested oral argument. This request is hereby denied as the record and the briefs adequately present the issues and the positions of the parties.

[2] The General Counsel's motion to strike Respondent's opposition to the General Counsel's response to the Notice To Show Cause is hereby denied.

this case to the Regional Director for the purpose of holding a hearing before an administrative law judge.

It is hereby ordered that Respondent's Motion for Summary Judgment be, and it hereby is, denied.[3]

MEMBER HUNTER, dissenting:

I would grant summary judgment as to the 78 subcontracted tasks for which Respondent alleges it gave at least 7 days' written notice to the Union. I would do so because the General Counsel did not contest Respondent's factual assertions regarding these allegations, and from my reading of the court's decision in *Olinkraft, supra*, it is clear that, based on Respondent's uncontested factual assertions, *Olinkraft* controls. And, based on *Olinkraft*, it is likewise clear that Respondent fulfilled its bargaining obligation regarding the 78 tasks by supplying the Union with the notice it did. In response to Respondent's specific assertions on the subcontracting issue, the General Counsel contended only that Respondent's motion should not be granted because allegations as to successorship and the refusal to supply information would remain unresolved. However, partial summary judgment would not leave those issues unresolved. They would, of course, be presented at the hearing along with the remaining allegations concerning the six subcontracted tasks for which Respondent concedes it gave no written notice. However, failure to grant summary judgment on the 78 tasks on which Respondent's motion is premised flouts the court's decision in *Olinkraft*, therefore I must respectfully dissent from my colleagues' failure to apply that decision here.[4]

[3] Our dissenting colleague would dismiss certain allegations of the complaint on the grounds that the General Counsel failed to rebut Respondent's contention that it had fulfilled its bargaining obligation as to these matters in the manner set forth in the court's *Olinkraft* decision. We note that, in the court's view, the mere giving of notice of an intent to subcontract is not necessarily sufficient to fulfill the bargaining obligation. Thus, the court said, the notice must be adequate and provide the union with a fair opportunity for bargaining. *Olinkraft* v. *N.L.R.B. supra*, 666 F.2d 308 (1982). Whether Respondent's notice here was sufficient cannot, at this juncture, be decided. This remains an unresolved material issue preventing the dismissal of these allegations.

In any event, Respondent attached to its motion three lists of tasks which it claims were furnished to the Union prior to the "outages" in issue here. A comparison of those lists with the tasks enumerated in the complaint reveals that, in addition to the six tasks for which Respondent concedes it failed to give written notice, four tasks appearing in the complaint are not present on the lists. Moreover, other issues exist concerning an additional eight tasks contained in Respondent's August 14 list. The departmental requests for each of these eight tasks carry dates ranging from August 22 to September 12, and the work on some of these eight tasks appears to have been performed after the "outage."

Thus, for all of the foregoing reasons, even assuming, but without deciding, that the Fifth Circuit's decision is controlling under principles of collateral estoppel, summary judgment is inappropriate.

[4] See generally *Sabine Towing & Transportation Co., Inc.*, 263 NLRB No. 19 (1982), on the principles of collateral estoppel applicable here.

While my colleagues indicate that there are some purported discrepancies between the lists which Respondent submitted and its claim to have given proper written notice on the 78 job tasks, I note that the General Counsel does not dispute Respondent's claim. Since the General Counsel, and not the Board, is in the best position to ascertain the truth of Respondent's claim, and he has not disputed it, I would rely on Respondent's assertion that it gave proper notice as to 78 of the subcontracted tasks.